

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

January 15, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1991**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**RONALD SCHMIDTENDORFF,**

**Defendant-Appellant.**

APPEAL from judgments of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

BROWN, J. Ronald Schmidtendorff contends that the police unlawfully detained him during a traffic stop because he had to wait twenty-nine minutes before he was given field sobriety tests. Schmidtendorff argues that the police had no reasonable grounds to allow that much time to elapse. He adds that rapid investigation and decision-making during suspected OWI stops is important because the elapsed

time since consumption is an important factor when trying to measure blood alcohol concentration.

We hold that the stopping officer's need to respond to another call was adequate justification for Schmidtendorff's extended prearrest detention. We also reject Schmidtendorff's suggestion that his prolonged detention had a significant and upward effect on his actual blood alcohol concentration by the time he was given field sobriety tests. We uphold the trial court's ruling regarding Schmidtendorff's arrest. We affirm his convictions for operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration. See § 346.63(1), STATS.

We have gathered the facts surrounding the arrest from the suppression hearings. We observe that Schmidtendorff raises no challenge to the testimony of the State's witnesses or to the trial court's analysis of this testimony.

On October 22, 1994, at about 2:10 a.m., a town of Summit police officer saw Schmidtendorff weaving between the fog and center lines along Highway P. After she observed Schmidtendorff nearly hit a stop sign and a semi-trailer parked along the road, she pulled Schmidtendorff over.

After making the stop, the officer approached Schmidtendorff and asked him for identification. While the officer was speaking with Schmidtendorff, she noticed that his eyes were glassy and bloodshot and that there was a strong odor of intoxicants in his vehicle. The officer then took Schmidtendorff's operating license and returned to her squad car. She radioed the dispatcher that she was going to perform OWI testing on Schmidtendorff. The dispatcher responded that a sheriff's deputy was being sent for backup.

However, while the officer was waiting for the deputy to arrive, she received a call at about 2:17 a.m. regarding a domestic fight in progress, about three-fourths of a mile away from the traffic stop. The officer waited briefly for the deputy to arrive and gave him Schmidtendorff's license. She also called the village of Oconomowoc police, seeking back-up for the deputy. She then left the traffic stop and proceeded to the domestic disturbance.

When the officer arrived at the domestic disturbance, she was met by a state trooper who had heard the call over his radio. While the trooper volunteered to assist the officer with the domestic dispute, he also explained that he did not want to make a domestic arrest within the

officer's jurisdiction. The officer thus asked the trooper to instead go to the traffic stop and help with that matter.

However, because the officer suspected that the person involved in the domestic dispute was somewhat violent, the trooper stayed at the domestic dispute until two sheriff's deputies arrived.

The trooper subsequently arrived at the traffic stop at 2:46 a.m. The trooper immediately began field sobriety testing, which Schmidtendorff failed. On the alphabet test, Schmidtendorff went through "P," slurred and began to mumble, and finished with "W" through "Z." When Schmidtendorff tried the heel-to-toe test, he almost fell over. Schmidtendorff also could not do the one-leg stand past a count of seven or eight. The trooper arrested Schmidtendorff at 3:02 a.m.

The trial court reached the following conclusions with regard to Schmidtendorff's claim that the twenty-nine minutes between when the officer went to the domestic dispute and the trooper returned to finish the investigation (2:17 a.m. to 2:46 a.m.) was unreasonable. In light of the limited number of available personnel, the trial court found that the officer made a reasonable choice when she decided to leave the traffic stop and attend to the nearby domestic

disturbance. In making this ruling, the court considered the comparatively greater "citizens' safety issues" involved with a domestic dispute. The court also determined that the deputy who remained on the scene did not act unreasonably by not proceeding with testing himself since the officer told him to wait for instructions. Moreover, the trial court recognized that the officer's other alternative, letting Schmidtendorff leave the scene while she attended to the domestic disturbance, would have created its own "citizens' safety issues" resulting from Schmidtendorff's suspected intoxication. In sum, while the trial court acknowledged that the officer could have possibly limited Schmidtendorff's waiting time by ordering the deputy to proceed with field testing in her absence, in light of the "coincidences" of that evening, the court could not conclude that the twenty-nine minutes of detention was unreasonable. Continuing further, the trial court also determined that the trooper, based on Schmidtendorff's performance on the field sobriety tests, had probable cause to arrest.

Schmidtendorff now renews his allegation that this detention was unreasonable and hence unconstitutional. We independently review the circumstances of the case when assessing such constitutional questions. See ***State v. Goyer***, 157 Wis.2d 532, 536, 460 N.W.2d 424, 425 (Ct. App. 1990).

The question of whether the police wrongly detained an individual prior to arrest is governed by the standard of "reasonableness." See **State v. Wilkens**, 159 Wis.2d 618, 626, 465 N.W.2d 206, 210 (Ct. App. 1990). In light of this standard, Schmidtendorff's basic appellate contention is that it was "unreasonable" for the police to make him wait twenty-nine minutes before administering the field sobriety tests.

The evidence that the State placed before the trial court, however, reveals that the delay was the result of specific concerns and circumstances, namely, public safety, officer safety and staffing. The stop took place in a lightly developed area. Thus, the four police forces involved had to work together and make judgment calls about how to allocate personnel. The delay that Schmidtendorff experienced stemmed from police efforts to apply their resources in a manner that best ensured public and officer safety. We join in the trial court's determination that the choices the officers made that evening were reasonable in light of the circumstances.

Schmidtendorff next raises what he terms a separate argument. He captions this argument, "The metabolism of alcohol by the human system requires rapid action in suspected OWI cases." Here, he explains that a person can

ingest alcohol without immediate impairment because alcohol does not instantly pass into the bloodstream. Schmidtendorff thus suggests that we should pay special attention when assessing the "reasonableness" of extended police detention in traffic stop scenarios because it may be more difficult "for a suspect to turn in an exculpatory performance on field sobriety tests."

This argument rests on the premise that the law technically prohibits excessive concentrations in the *bloodstream* of an intoxicated driver, not the *ingestion* of excessive amounts of alcohol. Still, we are concerned with the implications of how Schmidtendorff believes that this distinction should figure into the "reasonableness" of police decision-making. Even if it is possible for a person to consume a series of drinks at a tavern and rush home before the alcohol has time to enter his or her bloodstream, we do not believe that the legislature intended that we should account for such risk-taking when assessing the reasonableness of police conduct.

More to the point, if we nonetheless accept the *prima facie* plausibility of this second argument, Schmidtendorff does not buttress his theory with any facts, much less expert opinion evidence. He does not direct us to

the portions of the record indicating how the twenty-nine minutes of detention caused him to be more intoxicated when he took the sobriety tests than when he was first stopped. We have reviewed the transcripts and have identified where Schmidtendorff raised this possibility.<sup>1</sup> However, we do not see where he presented evidence necessary to this defense, such as, how much alcohol he consumed that evening, at what time he consumed it, and an expert opinion detailing how his human body processes alcohol. We therefore reject Schmidtendorff's claim that the "extra" twenty-nine minutes of detention made a difference.

*By the Court.*—Judgments affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

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<sup>1</sup> Schmidtendorff's counsel stated:

I guess the final argument I'd make and I'll be brief on it, is that based on [the trooper's] testimony, what he did, basically, his observations would support an arrest, but they are so far removed from the time of the stop and there is no statutory or common law presumption that--that field sobriety test[s] done forty-five minutes later have any bearing on the person's ability to drive at the time of the stop.

I would argue that his observations are essentially irrelevant in the determination that the court has to make due to the lapse of time.